In The

Supreme Court of the United States

October Term, 1976

76-180 J. HENRY SMITH, *etc. et al.*,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al., Appellees.*

76-183 BERNARD SHAPIRO, *etc. et al.*,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al., Appellees.*

76-5193 NAOMI RODRIGUEZ, *etc. et al.*,

Appellants-Intervenors,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al., Appellees.*

76-5200 DANIELLE and ERIC GANDY, *etc. et al.*,

Appellants-Plaintiffs,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc. et al., Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF A GROUP OF CONCERNED PERSONS FOR CHILDREN FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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1. Pursuant to Supreme Court Rule 42(3), a group of Concerned Persons For Children made up of James P. Comer, Anna Freud, Joseph Goldstein, C. Henry Kempe, Marianne Kris, Peter B. Neubauer, Sally Provence and Albert J. Solnit, moves the Court for leave to file the attached brief as *amici curiae.*

The members of the group have devoted a major part of their professional lives as pediatricians, child psychiatrists, and psychoanalysts to understanding and safeguarding the physical and emotional growth of children. They are experts from diverse schools and training in child and family development. Their concerns have focussed on how to maintain children in the care and custody of their own families and how to provide alternatives for them when they become victims of abuse, neglect or abandonment or when they cannot be cared for by their parents.

James P. Comer, Maurice Falk Professor of Child Psychiatry and Associate Dean of the Yale School of Medicine, is scholar, clinician and writer whose books, *Beyond Black and White* and *Black Child Care*, have opened a new chapter in our understanding of the pressures on and challenges to growing up Black in the United States.

Anna Freud, Director of the Hampstead (London) Child Therapy Centre, is the originator of child psychoanalysis and is a pioneer in day care for young children of the poor. During the blitz in war-torn London, Dr. Freud established model nurseries to care for children who could not stay with their parents. Her reports from the Hampstead nurseries provide scholarly insights and practical standards for how temporary foster care can and should be provided for children and their parents even under the most difficult conditions.

Joseph Goldstein, Walton Hale Hamilton Professor of Law, Science and Social Policy at Yale Law School and Professor at the Yale Child Study Center is a lawyer and psychoanalyst. He has written extensively in

family law and is, with Anna Freud and Albert J. Solnit, author of *Beyond The Best Interests Of The Child.*

C. Henry Kempe is Director of the National Center for the Prevention and Treatment of Child Abuse and Neglect and Professor of Pediatrics and Microbiology at the University of Colorado Medical Center. His research on small pox was responsible for saving the lives of many children the world over. He was the first to research into causes of the battered child syndrome and to develop model intervention programs to protect children from child abuse.

Marianne Kris, of New York City, is a child psychiatrist and psychoanalyst. She has been the teacher and counsellor of scores of experts in the care and treatment of children throughout the United States and Europe.

Peter B. Neubauer, Director of the Child Development Clinic of the Jewish Board of Guardians, is child psychiatrist and psychoanalyst. Teacher, researcher and clinician, he has established model child care facilities for vulnerable children in New York City.

Sally A. Provence, Professor of Pediatrics and Director of the Child Development Unit at Yale Child Study Center, is a psychoanalyst and expert in early child development. Dr. Provence is known for her studies of children in institutions and of children born into high risk environments. She is author of *Infants In Institutions.*

Albert J. Solnit is Sterling Professor of Pediatrics and Psychiatry at Yale Medical School and Director of the Yale Child Study Center. He is Senior Editor of the

Psychoanalytic Study of the Child, a past President of the American Academy of Child Psychiatry and currently President of the International Association for Child Psychiatry and Allied Professions.

Two members of the group, Drs. Goldstein and Solnit, as expert witnesses in child development, not as experts in law, gave depositions in this case.*

2. Out of concern for all children, particularly for the children of the minority urban poor, who are the primary victims of abuse in the current administration of foster care, the group of Concerned Persons For Children was formed to render such assistance as it can to the Court's deliberations in this case.

The case is of major interest to the group, because the Court's decision can directly affect the lives and well being of the more than 350,000 children who are now in foster care and the countless thousands more who may in the future be in foster care in the United States.

3. The members of the group do not seek to press upon the Constitution a particular theory of human nature. Rather they seek only to have recognized

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* Appellants' Joint Appendix To Jurisdictional Statement pp. 191a-235a.

Amici have served and continue to serve in an advisory capacity to numerous public and private bodies. Anna Freud is on the Advisory Board of the Organization of Foster Families for Equality and Reform Inc. Joseph Goldstein and Albert J. Solnit are members of the same advisory board, and are members of the Expert Panel of the New York State Board of Social Welfare's Monitoring Project.

The Institutional association of *amici* is provided for identification purposes. They do not necessarily represent the view of their institutions.

what is a universal experience of humankind, the familial bond that develops between parents and children in their long term care. The life support system provided children in the form of long term foster parents must not be withdrawn without anything less than careful consideration of the impact of such action upon the child and of the adequacy and availability of permanent parents. It is the process for withdrawing such life-support systems from the child, not the substantive basis for such action, that is in issue here. The group argues only that before a child and his long term foster parents are separated, the process should provide a full hearing for all concerned parties before an impartial and independent decisionmaker. The group, prompted as much by common sense as by its collective expertise, asks the Court to confirm the unconstitutionality of state action which forcibly breaks familial bonds without a process which can protect against discrimination, whim and caprice.

4. Consent to the filing of a brief by the group, as *amici curiae*, was obtained from Appellees, but was refused by Appellants-Intervenors, by Appellants-Plaintiffs and by Appellants-Defendants J. Henry Smith, *etc. et al.* At the time of printing, no response to letters requesting consent was received from Appellants-Defendants Bernard Shapiro, *etc. et al.*

5. In light of the substantial impact on children and their parents which the Court's decision in this case inevitably will have and the complexity of the issues involved, the group of Concerned Persons For Children urges the Court to grant this Motion and grant

the group leave as *amici curiae* to file the attached brief.

Dated this 15th day of January, 1977.

Respectfully Submitted,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF A GROUP OF CONCERNED PERSONS FOR CHILDREN AS AMICI CURIAE

INTEREST OF AMICI CURIAE

A description of *Amici* and their interest is set forth in the above Motion for Leave to File Brief *Amici Curiae*.

SUMMARY OF ARGUMENT

At issue in this case are the long term relationships that develop between foster parents and the children entrusted to their care. The question is whether the State of New York can terminate these relationships without a modicum of procedural justice.

The *amici* are a group of professionals deeply concerned with the welfare of children. Their interest in this case is not to further some school of thought or dogma. Rather, their interest is in the welfare of children. Their professional activities have made them see, more clearly, what is accessible to all people. It is only upon this common experience and a deep concern for children that they draw.

This common experience, recognized by The District Court in this case, reveals that the relationship between foster parents and children in their long term case is of sufficient intimacy and intensity to constitute an interest worthy of protection under the due process clause. It is a familial bond. It is a liberty interest comparable to that recognized in *Stanley* v. *Illinois*, 405 U.S. 645 (1971), as requiring due process before it is terminated. The development of this familial bond between foster parents and the children in their long term care cannot be prevented by contract or by declarations of intent by the State of New York.

Once the existence of the familial bond is recognized, the question in this case is who should speak for it. The counsel appointed by the District Court for the foster children, Helen L. Buttenwieser, has opposed preseparation hearing; and on the basis of this disclaimer the State argues that there is no "case or controversy." This argument fails because it ignores

the role of the foster parents. The foster parents are an integral part of the protected relationship, and they can speak for that long term relationship in their own right. They can insist that the relationship -- their liberty interest -- should not be terminated without a hearing. They can also claim the liberty interest of their foster children. The District Court appointed counsel for the foster children in order to make certain that all viewpoints were fully aired. But appointed counsel did not become the exclusive spokesman for the children. Until the foster care relationship is terminated and the long term foster parents are dislodged they are as much entitled to speak for the children entrusted to their custody as appointed counsel or as representatives of the State.

The protection sought in this case is not substantive. To mandate a pre-separation hearing does not require the Court to take sides between biological and foster parents in the relatively few cases in which foster parents and biological parents may be in conflict. In New York dismemberment of foster families does not typically result in the children being reunited with their biological parents. Rather, it is generally the case that New York State foster children, including many of the named children in this action, face the prospect of being separated from their foster parents and placed with strangers. *Amici* urge only that before separation a full hearing be provided to resolve, in accord with state law, any conflicts between interested persons.

The protection sought in this case is exclusively procedural. Under *Mathews* v. *Eldridge*, _____U.S._____, 96 S.Ct. 893 (1976) a pre-separation hearing before an independent agency is required because: (1) the harm

suffered by an erroneous separation is in the deepest sense irretrievable; (2) the substantive standards used for termination -- for example, what is in the best interests of the child -- are sufficiently complex to create a high risk of error; and (3) pre-separation hearings would further the public interest. There is no basis for creating an exception to the *Mathews* rule on the theory -- wholly specious -- that the impersonal relationship between the State and the child is the equivalent of the personal relationship between individual parent and child.

The *amici* believe that procedural justice requires New York to establish a system for affording pre-separation hearings. New York should have considerable latitude in designing the system, but at a minimum it must contain these elements: (1) the hearing must precede the termination; (2) the agency must give notice to long term foster parents of its proposed action, the grounds for its action and the right to a hearing; (3) prior to the hearing the agency must give the foster parents access to its files; (4) the hearing must be on the record, assure the right of cross-examination, and that all interests are adequately represented; and (5) the hearing must be held before an impartial and independent decisionmaker.

To ignore these requirements is to ignore the familial bond that arises out of the long term relationship between foster parent and child.

ARGUMENT

I.

THE RELATIONSHIP BETWEEN FOSTER CHILDREN AND THEIR LONG TERM FOSTER PARENTS IS A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

The liberty interest asserted here is the "familial bond" which is established between a child and the adult who cares for that child. That interest is firmly centered in the spectrum of constitutionally cognizable family rights.

The Court has recognized at least two separate parent-child interests that are protected by the Fourteenth Amendment. One is the entitlement of natural parents and their children to each other, an interest which rests on the fact of biological reproduction and arises when the child is born. The other protected interest, which appellants ignore, is in the "familial bonds" which develop over time, not only between biological parents and the legitimate or illegitimate children in their long term care, but also between adopting parents and the adopted children in their long term care as well as between foster parents and the foster children in their long term care.

Stanley v. *Illinois* 405 U.S. 645 (1971) involved a biological parent but the Court recognized both types of interest. *Stanley* acknowledged that "familial bonds" between parent and child derive from the "custody, care and nurture, of the child" by the parent. *Id.*, at 651, 652. Stanley had lived with his illegitimate children all of their lives. *Id.*, at 650 n. 4. The Court noted that such familial bonds "were often as warm, enduring and important as those arising within a more formally organized family unit." *Id.*, at 652.

The existence of the familial bonds, recognized in *Stanley*, does not depend on the biological relationship between an adult and a child. Rather, they are created by an adult caring for his child over a period of time. In a long term foster home the child gains membership in a small, closed unit, receives nurture and protection by caring adults, and enjoys a feeling of being wanted, "looked after" and appreciated. Familial bonds develop whether the caretaking parent is married or unmarried, biological or foster, and are deserving of due process protection under the Fourteenth Amendment.

From the child's point of view fostering is not temporary where it exceeds the period of time during which individual children (always according to their ages) can preserve any previous inner tie to an absent parent.[1] Where foster parents are adequate and return

[1]In this case the named plaintiff foster children had been with their respective foster parents for substantially longer than one year. Eric and Daniel Gandy had been with their foster mother, Madeline Smith, continously for four years when she was notified that they were to be removed from care because "it is now in their best interests to leave your home." *Organization of Foster Families For Equality and Reform* v. *Dumpson*, 418 F. Supp. 277, 280 (S.D.N.Y. 1976). (hereinafter referred to as "District Court Opinion") Mr. and Mrs. Lhotan cared for their foster children, Cheryl and Patricia Wallace, continously for approximately four years, and for the two younger Wallace children, Cynthia and Cathleen, for approximately two years when the Lhotans were notified that their foster home was to be broken up. *Id.*, at 280. Rafael Serrano has been cared for by his foster parents, Mr. and Mrs. Goldberg, continously since 1969; prior to that time Rafael had lived with a succession of foster families after having been abused by his biological parents. *Id.*, at 280.

The situation of these children is more typical of the "temporary" indeterminate system of foster care provided by New York State than the situation of the children of the intervenor parents. As the District Court found: "[T]he average child placed in foster care remains within the system for approximately 4-½ years." *Id.*, at 281.

affection, new familial bonds are formed and over time become consolidated.[2] As fostering time lengthens, and where no further separations follow, the new relationship will occupy more and more the place of the former one, as happens in adoptions. From this point, the foster parent-child relationship deserves all the recognition and protection that the biological parent-child relationship is entitled to and actually receives. Separation from the long term foster parent will be no less painful and no less harmful to the well-being of the child than is separation from the biological parent. Typically, in New York, the separation results in another foster placement,[3] but even if it does not the pain and detrimental consequences of separation will not be lessened by return to biological parents who, in the meantime, may have become strangers.[4]

The notion that affectionate and meaningful ties develop between humans in close association over time -- children with adults, adults with adults, children with children -- is not the monopoly of any one discipline or of any one school within a given discipline. It is no one's dogma. It is bedded in the common experience of all peoples. It is reflected in the Constitutional protections to be free to associate with one another, to be

[2]Though any specific time period is arbitrary, *amici* believe it is unrealistic from the child's point of view to presume that very significant familial bonds will not have developed by the time a child has been in the care of the same foster family for a year.

[3]R., Answers of state defendants Lavine and Shapiro to plaintiffs' interrogatories, Aug. 12, 1974; R., dep. of Prof. David Fanshell, pp. 113, 119, Exh. A and B, p. 161. Motion to Affirm of Appellees' Organization of Foster Families for Equality and Reform, dated August 31, 1976, p. 11. And see District Court Opinion at 279 fn. 6.

[4]J. Goldstein, A. Freud, A. Solnit, *Beyond The Best Interests Of The Child*, pp. 17-20 (1973), and Goldstein, *Why Foster Care -- For Whom And For How Long?*, 30 The Psychoanalytic Study of the Child, 647 (1975)

secure in one's own person and to be secure in one's own home. It is the core meaning of both life and liberty and the pursuit of personal fulfillment which the Fourteenth Amendment of the Constitution protects from intrusion except with due process.

The State argues that, when it places a child in foster care, it explicitly indicates that it does not intend to create an intimate bonding, an intent which is evidenced by the terms of foster parent contracts. A substantially analogous argument failed to persuade Mr. Justice Harlan in his dissent in *Poe* v. *Ullman*, 367 U.S. 497 (1961), upon which he later relied in his concurrence in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). There, the State argued that marriage did not carry with it the right to use contraceptives because the state issues marriage contracts on the explicit condition that the parties not use contraceptives. Mr. Justice Harlan could not accept that argument because it ignored human nature and the intimacy necessarily spawned by the marriage relationship. The state, having sanctioned the marriage institution, could not disregard the consequences of its action and pretend that state regulation of the details of sexual intercourse among married couples is consistent with that relationship.[5] Similarly, when the state leaves

[5] " . . . [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." *Poe* v. *Ullman* 367 U.S. 497, 553 (1961)

the child in a foster family for a substantial period, it is impossible for adult and child to remain neutral business partners. The State's claim that no relationship of importance should have developed is ridiculous. The Fourteenth Amendment demands, as Mr. Justice Harlan recognized in *Griswold*, that the state not be permitted to ignore the human consequences of its action.

II.

A "CASE OR CONTROVERSY" EXISTS BETWEEN NEW YORK STATE AND FOSTER CHILDREN AND THEIR LONG TERM FOSTER PARENTS.

Having established a constitutionally protected interest in a familial bond, the question becomes who can speak for it. This question arises because Helen L. Buttenwieser, the court- appointed counsel for the foster children, opposes a pre-separation hearing. Because of this, the State argues, there is no "case or controversy." This argument fails; a "case or controversy" is present because the constitutional rights of long term foster parents as well as long term foster children are threatened with injury by new York State procedures. Further, appointment of counsel for children did not make her their exclusive spokesman. Her appointment in no way vitiates the entitlement of long term foster parents to assert the rights of their long term foster children.

A. The Interests Of Long Term Foster Parents Are Directly Threatened With Injury By The Absence Of A Full Pre-Separation Hearing.

Foster parents have a cognizable interest in the familial bonds between them and their long term foster

children. Not unlike such other cognizable and substantial liberty interests as freedom of speech, freedom of association and the right to vote, the "familial bond" is a "reciprocal right."[6] The District Court did not rest its decision on the potential injury to the foster parents' interest in this reciprocal relationship because it found the potential injury to each child's interest sufficient. Nevertheless, the District Court acknowledged that none of the Appellants "dispute the strength of the emotional ties binding plaintiffs and their foster children nor the loss that will be felt if those ties are severed." District Court Opinion at 280. When these familial bonds are severed by the State, long term foster parents, not to mention their children, suffer "concrete injury from the operation of the challenged statute" and with respect to the demand for a hearing "[t]he relationship between the parties is classically adverse and there clearly exists between them a case or controversy in the constitutional sense." *Singleton* v. *Wulff*, ___U.S.___, 96 S.Ct. 2868, 2873 (1976).

[6]In *Stanley* v. *Illinois*, 405 U.S. 645 (1971), the Court explicitly stated that the parent's interest is "in retaining custody of his children," and that the children's interests in their parents is in not suffering "uncertainty and dislocation." *Id.*, at 652 and 647. And see, *Virginia Pharmacy Bd.* v. *Virginia Consumers Council*, ___U.S.___, 46 S. Ct. 1817, 1823 (1976): "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases [citing many] . . . If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." The Court, it should be further noted, recently cited with approval reference to "freedom of association in the home." *U.S. Department of Agriculture* v. *Moreno*, 413 U.S. 528, 535 n. 7 (1972) quoting 345 F. Supp. 310, 314 (D.D.C. 1972).

B. Foster Parents Are Entitled To Assert The Rights Of Their Long Term Foster Children.

Children have no legal capacity to speak for themselves, or to select and to retain their own counsel to represent them. In most cases involving children, parents speak for them. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). In the foster care situation, biological parents typically are not available to speak for them; even where they are, the situation is complicated by the prior intervention of the state as temporary custodian and by the presence of the long term foster families as the caretaking parents of their long term foster children. The purpose of a pre-separation hearing is to sort out these relationships.

From the child's point of view no generalization can be made either that all children who have been in foster care with the same family for a year or more should be separated from their foster parents or that all such children should remain with their foster parents.[7] The only way to ensure that no child is deprived of a family without due process is to conduct a hearing in each case at which all those claiming to be the adult parties in the parent-child relationship can present their views. Until that hearing is convened and the foster family is dismembered with adequate process, the right of the foster parents to speak for the children in their long term care is at least as great as the right

[7]See footnote 2 *supra*.

of the State, the biological parents or the court-appointed counsel.[8] Just as appointment of counsel for children in a divorce custody dispute or neglect proceeding does not foreclose the right of separating or allegedly neglecting parents to speak for their children, so the appointment of Helen L. Buttenwieser does not vitiate the standing of the long term foster parents in this case to speak for the children entrusted to their care. A scrupulous concern for possible conflict of interest led to the appointment of *separate* but *not* of *exclusive* representation for the children.

Separate counsel for the foster children was appointed because the District Court believed that counsel for the foster parents could not "provide effective assistance to the court in defining, articulating and exploring those interests of the children which are *potentially* adverse to those of the foster parents."[9] Her function was to serve as a fail-safe mechanism -- to ensure that all points of view were presented. But her voice was not intended to silence all others. None

[8]The District court, ruled that each child is entitled to a hearing before "he can be peremptorily transferred from the foster home in which he has been living." District Court Opinion at 282. Foster parents have standing to assert their foster children's right to such hearing both because of the relationship between them and because if they were denied standing the children's constitutional right might be diluted. Cf. *Singleton* v. *Wulff*, ___ U.S. ___, 96 S.Ct. 2868, 2874 (1976); *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-446 (1972); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-459 (1958); *Barrows* v. *Jackson*, 346 U.S. 249, 255-257 (1953).

[9]Appellants' Joint Appendix To Jurisdictional Statements p.64a (emphasis supplied) - Judge Carter's opinion, dated December 10, 1974, denying the Civil Liberties Union's motion to be retained as counsel for the foster children, or, in the alternative, to appoint Dr. Kenneth Clark as guardian *ad litem* to the children. "The court has acted on its own motion on behalf of the children in retaining counsel for them. The court's action is similar to that of a party in retaining counsel on his own behalf..." *Id.*..., at 67a.

of her clients, not even the originally named foster children could instruct her as to their desires, ignore her advice, express dissatisfaction with her representation or engage other counsel. She could not be and was never intended to be the final arbiter of the interests of even one child -- much less a whole class of children.

III.

NEW YORK STATE PROCEDURE VIOLATES THE FOURTEENTH AMENDMENT BY FORCIBLY SEVERING THE FAMILIAL BONDS BETWEEN FOSTER CHILDREN AND THEIR LONG TERM FOSTER PARENTS WITHOUT PROVIDING A PRE-SEPARATION HEARING.

Amici curiae do not ask the Court to assess the legitimacy of State ends in separating foster children from their long term foster parents. *Amici* only argue that the familial bonds, which the Court recognized in *Stanley* v. *Illinois*, 405 U.S. 645 (1971) as warranting Constitutional protection, cannot be invaded without due process. New York procedures do not satisfy the requirements of due process.

New York procedure empowers partisan administrative officials forcibly to separate a child and his long term foster parents prior to a full evidentiary hearing before an independent decisionmaker. Simply upon ten days notice, an authorized state or private agency can remove children from their long term foster families. Regulations offer no more than an informal conference during the ten day period to foster parents who object to the agency's decision. They are not given access to agency records or permitted to cross-examine witnesses. They have the burden of proving to the agency that its decision to break up their family is wrong without any obligation upon the agency to disclose the grounds for its action. [10] This

[10] N.Y. Social Services Law §383 (2); 18 N.Y.C. R.R. §450.10.

failure to satisfy due process is not remedied by the periodic review provisions which go into effect after a child has been in foster care for eighteen months.[11] These provisions contain no prohibition against separation of foster children from their foster parents prior to a hearing, either before, during or after the review. For example, a foster child whose case review in January results in a decision to leave him with his foster parents may be removed from that same foster family in March of the same year simply by agency edict.

New York procedure does not satisfy the standards for due process elaborated in *Mathews* v. *Eldridge* ___ U.S. ___, 96 S.Ct. 893 (1976). There the Court set forth three distinct factors which must be considered in determining the specific dictates of due process:

> " . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 903.

Application of these factors to this case inevitably leads to the conclusion that long term foster families have a constitutional right to a pre-separation hearing "closely approximating a judicial" proceeding. *Id.*, at 902.

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[11] N.Y. Social Services Law §392.

A. The Liberty Interest In The Familial Bond Cannot Be Fully Protected By Post-Separation Hearings.

The private liberty interest at stake cannot be fully protected by post-separation hearings or by subsequent judicial review. To be a child is to be in a crucial and dependent phase of human growth in which primary relationships cannot be turned off and on again without damage. An erroneous wrenching of the nurturing bonds between the long term foster child and his long term foster family is the kind of damage that is not fully -- or even substantially -- recompensable even by ordering a resumption of the broken relationships. In terms of irreparable injury, an erroneous breaking up of delicate and complex long term foster family relationships is far more serious than would be such an unthinkable action as, for example, an agency intentionally breaking a child's arm for some therapeutic purpose, recognizing that such a mistake may be "corrected" by resetting the limb which, though scarred, may grow together again as "strong" as it ever was. Unlike the disability benefits in *Mathews* -- unlike most private *property* interests affected by official action -- the private *liberty* interests of child and parent to be secure in their relationship can never be fully restored by retroactive relief. *Amici* find it difficult to conceive of any more consequential deprivation than the forced separation of a child from the adult persons upon whom he has grown to rely.

B. The Risk Of Erroneous Severing Of The Familial Bond Is High

The risk of an erroneous deprivation of the liberty

interests at stake is high because the existing pre-separation procedure is unreliable and unfair. By replacing present procedure with a prior hearing the Court can greatly decrease that risk for children and their long term foster parents.

Unlike the decision to terminate disability benefits at issue in *Mathews*, the decision to separate the long term foster child from his long term foster family and the equally significant decision of placing the separated child are neither "sharply focussed [nor] easily documented." *Mathews* v. *Eldridge*, ___U.S.___, 96 S.Ct. 893, 907 (1976). Indeed, New York State acknowledges that "the decisions of the foster care agency [are] rendered on the most intangible, complex and non-quantifiable grounds."[12] As in *Goldberg* v. *Kelly*, 397 U.S. 297 (1970), distinguished by the *Mathews* Court, a wide variety of information, including the testimony of the foster parents themselves, may be deemed relevant, and conflicting professional views "often are critical to the decisionmaking process." *Id.*, at 907.

Amici recognize that there is considerable disagreement as to what the standards are for separating foster children from their long term foster parents, but no matter what the standards, their application involves difficult and subtle questions. The complexity of the questions increases the likelihood of error. The plight of foster children and biological and foster parents, and the grave risk of violations to their liberty interests in the present "act-first-and-decide-later-whether-it-was-right" procedure, are highlighted by

[12]Jurisdictional Statement of Appellants-Defendants, Bernard Shapiro, etc., dated August 6, 1976, 15.

the Temporary (N.Y.) State Commission on Child Welfare in its 1976 Annual Report *The Children of the State II*. The Commission concludes: "What we are dealing with is an intake and treatment lottery produced by the absence of clear uniform standards governing children in need of care services." *Id.*, at 18. Minimally, due process, in accord with *Mathews*, mandates a full pre-separation hearing by an independant decisionmaker.[13]

C. Pre-Separation Hearings Are Not In Conflict With The Public Interest.

In *Mathews* and in the cases on which it relies the public interest is a significant factor in assessing state

[13]The high risk of violations to liberty interests in New York practice is apparently not uncharacteristic of the plight facing long term foster families generally. Professor Mnookin in *Child Custody Adjudication: Judicial Function in Face of Indeterminacy*, 39 Law and Contemp. Prob., No. 3, 226, 273-274 (Summer 1976) writes:

> "The existing legal framework for foster care does not prevent the convenience of the social-welfare system, rather than the interests of the child, from being the primary motivating factor. Social workers, their supervisors, and juvenile court judges lack the time and energy (given substantial case loads) to make careful individualized determinations of what would be best for a child. Instead, these state officials apply unarticulated rules of thumb. Many decisions are made because of organizational considerations having nothing to do with the interests of the child. In all events, because virtually any conclusion can often be justified under the vague rubric of best interest, there is no necessity for these officials to specify either their value judgments, their psychological hunches, or the organizational consideration underlying their rules of thumb."

procedures. This interest appears, in large part, to be concerned with incremental financial costs to the state of the due process safeguards being sought. But, even where only property interests are at stake, "[F]inancial cost alone is not a controlling weight." *Mathews* v. *Eldridge*, ____U.S.____, 96 S.Ct. 893, 909 (1976). Where, as here, the liberty interest in the familial bond is in jeopardy, the Court, in *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1971), emphasized:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (footnote omitted).

Actually, in this case, there is no conflict between the human and financial goals that comprise the public interest factor. Both will be served by assuring due process.

The requirement of full pre-separation hearings should act as an incentive to keep children with their biological families rather than place them in more costly indeterminate foster care in the first place. The State argues: "In the future, mothers will be much more hesitant to utilize the foster care system at all, even in the worst of personal difficulties. The risk of losing a child forever once in foster care will encourage them to seek temporary, if less satisfactory,

solutions outside the formal foster care system."[14] If the State's prediction is correct, the total number of children in costly long-term "temporary" foster care will be reduced as will the financial burden on the state. More important, the public interest would be furthered because funds would be released to provide supportive services for poor and minority families at risk, rather than continue to be used to force their dismemberment in unwarranted neglect proceedings [15]

[14]Jurisdictional statement of Appellants-Defendants, Bernard Shapiro etc., dated August 6, 1976, 24-25.

[15]A study undertaken by the New York State Board of Social Welfare, in conjunction with the New School for Social Research, entitled *Foster Care Needs and Alternatives to Placement: A Projection for 1975-1985*, "found that many children placed outside their homes could have stayed home, or could have returned home at an earlier time with a better likelihood of remaining there, if appropriate supportive services had been available." Quoted in Temporary (N.Y.) State Commission on Child Welfare, 1976 Annual Report, *The Children of the State II*, 9-10.

In a 1975 report prepared by the State Board of Social Welfare entitled *Foster Care Needs and Alternatives to Placement: A Plan For Action* . . . . it was noted that "[T]he lack of funding for community-based preventive and supportive services for families at risk has often led to the inappropriate entry of many children into the foster care system." (p. 3).

"Since 1970, black and Puerto Rican children have accounted for more than 75% of the total New York City foster-care population. Catholics and Protestants are almost equally represented and together, accounted for over 95% of the total caseload in 1974. Whereas the percentage of all New York City children in foster care has been increasing, a black child is three times, and a Puerto Rican child more than twice as likely as a white child to be removed from his family." T. Lash and H. Sigal, *State of the Child: New York City* (Foundation for Child Development, 1976), 61. (references to appendix omitted).

or in so-called "voluntary" placements under the threat of neglect proceedings and with the false hope that foster care will really be temporary.[16] "So long as foster care is expected to be and is in fact temporary in theory only, it can be, as it has become, a legal fiction for destroying families, especially poor ones."[17] To assure, particularly minority families, whose children are the largest users of foster care, that the state has an incentive to make foster care truly temporary, the due process sought here would not only encourage the state to return children to their biological parents before the expiration of the critical year, but it would give the state an incentive to cease using foster care "as an almost knee-jerk reaction threatening family crises."[18]

[16]For example, intervenor appellant Dorothy Nelson Shabazz was accused of neglecting her five children. "She was told that if she placed her children, for three months, [in foster care] no court action would be taken." Jurisdictional Statement of Appellants-Intervenors, Naomi Rodriquez, etc., dated Aug. 9, 1976, p. 8. "After she secured counsel, a neglect proceeding was brought against her and was dismissed . . ." *Id.*, at 8, fn.

[17]Goldstein, ***Why Foster Care - For Whom And For How Long? 30 supra*** at 657. The Psychoanalytic Study of The Child, 647, 657 (1975).

[18]Temporary (N.Y.) State Commission On Child Welfare, 1975 Annual Report, *Children Of The State*, p. 24. And see J. Goldstein, ***Why Foster Care - For Whom And For How Long?, supra*** at 658: "Clarification that the purpose and the expectation of . . . foster care [is] to preserve the family relationships for child and adult parents and that it must be temporary should prompt at the time of [possible intake] a realistic evaluation of the circumstances which suggest consideration of foster care and of the opportunities for its effective implementation. Recognition, for example, that the circumstances which justify foster care are more chronic than acute and that the probability of long-term separation is very high should force renewed consideration of supportive resources for keeping the family intact."

As for administrative costs, New York State's overall financial burden will be lessened, not increased, by providing long-term foster families an opportunity for full pre-separation hearings. The expense of a fair hearing is the same whether held before or after separation. The State's prediction of more hearings must be balanced against a decrease in the number of hearings resulting not only from State-predicted decreases in the "voluntary" use of long term foster care, but also from a decrease in unwarranted State action to dismember biological and long term foster families. To the extent separation results in the foster child being placed in another foster home, the financial cost is either the same, or in some cases greater, since, under the present procedure, the administrative cost of at least two moves is incurred for each erroneous determination. To the extent that placements are to institutions, the cost of the current procedure is from two to five times the cost of leaving the child with his foster family pending a final determination.[19] In the event of erroneous separations there would again be the administrative costs of two unnecessary moves. To the extent a child is returned to his biological parents, there is some saving to the State in the current procedure pending final determination. However, placement back to the biological parents occurs in a minority of instances and again the State must bear the additional cost of two unnecessary moves when such decisions are found to be erroneous.

[19]Temporary (N.Y.) State Commission on Child Welfare, 1975 Annual Report, *Children Of The State*, 27.

D. The Proposed Exception To *Mathews* Is Untenable.

Application of the three *Mathews* factors make manifest that the claimed right of New York State to break up long term foster families without reviewable standards and without a prior evidentiary hearing before an independent decisionmaker "immediately collides with the requirements of the Constitution." *Goss* v. *Lopez*, 419 U.S. 565, 575 (1975).

The State argues for an exception to *Mathews* based on its claim that "[T]he absence of antagonism between the agency and child sharply distinguishes the foster care transfer situation from the usual context in which this Court has found cognizable Fourteenth Amendment interests."[20] This argument is specious. It fails to recognize that "constitutional values are called into question whenever the state professes to act with children in the role traditionally taken by parents in this society."[21] It fails to comprehend the difference between the *concept* of impersonal parenthood as exemplified by the state and the *actuality* of parenthood as exemplified by caretaking biological or foster parents. Unlike the human parent, the state,

[20]Jurisdictional Statement of Appellants-Defendants, Bernard Shapiro, etc., dated August 6, 1976, 14-15.

[21]Burt, *Developing Constitutional Rights Of, In And For Children*, 39 Law & Contemp. Prob., No. 3, 118, 137 (1975).

as parent, cannot be entrusted to make crucial decisions as to a child's disposition without procedural due process.[22]

Both the 1975 and 1976 Annual Reports of the Temporary (N.Y.) State Commission On Child Welfare demonstrate, not a coincidence, but an *inherent* conflict of interest between agency and the individual foster child. The fact (as opposed to the State's self-serving fantasy) is that the New York system has too often failed to serve a child's best interest, which is to ensure for it a permanent, family relationship. It has failed by taking inadequate steps to prevent the break-up of biological families. It has failed by leaving

[22]The notion that juvenile delinquency proceedings were "civil," not criminal, and, therefore, not subject to due process also rested on the *parens patriae* doctrine which the State invokes here to establish the identity of its interest with that of all foster children. The Court in *In Re Gault*, 387 U.S. 1, 17-19 (1967) recognized the inherent limitations on the capacity (and thus the need for limits on the power) of the State to act in *loco parentis* to represent and protect the child as would a responsible, caretaking parent -- whether biological, adoptive or long-term foster:

> "Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context .... Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure .... The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."

foster children in limbo for years at a time [23] and then separating them, without any prior review, from what is often the only family they have known. In the current New York "system" in which each agency sees itself "as a jealous sovereignity, resisting the encroachments of alien authority"[24] only chance, not practice, is likely to provide a "coincidence of interests" between foster-child and agency.

E. What Process Is Due?

Amici believe that procedural justice requires New York to establish a system of pre-separation hearings. *Amici* agree with the District Court that New York should have considerable latitude in designing the system, but at a minimum, *Mathews* requires that the system must contain the following elements: (1) the hearing must precede the termination; (2) the agency must give notice of its proposed action, the grounds for its action and the right to a hearing; (3) prior to the hearing the agency must give the foster parents access to its files; (4) the hearing must be on the record and assure the right of cross- examination and that all interests are adequately represented; and (5) the hearing must be held before an impartial and independent decisionmaker.

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[23]Even Section 392 of the New York Social Services Law which provides for periodic review of the cases by the Family Court was enacted "over the virtually unanimous protestations of child care agencies and social services officials throughout the State." Temporary (N.Y.) State Commission on Child Welfare, Final Report, *Barriers to the Freeing of Children on Adoption*, 14. (Title IV-B, Research and Demonstration Project, March 1976).

[24]Temporary (N.Y.) State Commission on Child Welfare, 1976 Annual Report, *Supra*, at 11.

CONCLUSION

New York procedure empowers partisan administrative officials forcibly to separate a child and his long term foster parents prior to their having an opportunity for independent review. Such a deprivation of liberty without process in the conduct of one of the most intimate concerns of an individual's personal life is intolerable and unjustifiable.

The protected interests in this case rest not on a particular theory of human nature but upon the universal experience of humankind. No contractual agreement, no declaration of intent by the State, can preclude the long term foster home from becoming for child and parent the seat of family life. It is beyond the limits of law to prevent the development of those familial bonds between child and his adult caretaker that the Fourteenth Amendment was intended to protect.

The life support system provided children by New York in the form of long term foster parents must not be withdrawn without anything less than careful consideration of the impact of such action upon the child and of the adequacy and availability of other permanent parents. Further, it must be recognized that once a child has been in long term foster care with the same foster family the intrusion is equally great whether the agency's purpose is to place the foster child with other foster parents, with his biological parents, with new adopting parents or in an institution.

It is the process for withdrawing such life-support systems from the child, not the substantive basis for such action, that is in issue here. *Amici* do not argue that New York does not have a proper state purpose. *Amici* argue only that the process must provide, before child and long term foster parent are separated, an opportunity for review by a body more neutral than the agency itself which initiates such actions.

Finally, it should be obvious once said that the violations of due process against children and their biological parents which occur when they are initially separated under state pressures that belie the "voluntariness" of many foster placements must not be used to justify further deprivations of liberty. No child in long term foster care, however poor, should be deprived of constitutional protection a second time to "make up" for a state agency's initial failure to afford due process at intake to the very same child and his biological parents. A child must not be used -- unless such use comports with the child's best interest in accord with state law -- as money or property can be used, to compensate persons for violations of their constitutional rights. To do so is only to compound the error and to be blind to the nature of human relationships and to that liberty interest in the integrity of the family which the Constitution is meant to safeguard.

In sum, it is difficult to conceive of any more consequential deprivation than the forced separation of a child from the adult persons upon whom he has grown to rely. New York practice deprives children and their long term foster parents of their freedom to associate, to live and grow with one another and of the security of their person and of their home, without proof that

such intrusion will serve, as state law requires, the best interests of the child.

For the reasons stated above, the decision of the District Court should be affirmed.

Dated this 15th day of January, 1977.

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